A

NG PENG SENG v. PP & ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
MOHTARUDIN BAKI JCA
TENGKU MAIMUN TUAN MAT JCA
AB KARIM AB JALIL JCA
B [CRIMINAL APPEALS NO: J-05(M)-217-08-2015
& J-05(M)-223-08-2015]
11 JANUARY 2017

C ***CRIMINAL PROCEDURE:*** *Appeal – Appeal against sentence and conviction – Discovery of drugs in car boot – Accused persons convicted for offence of trafficking drugs and sentenced to death – Allegations that accused persons sought help and settlement from police and attempted to flee – Whether proved – Whether words uttered in reference to drugs – Whether accused persons had knowledge, custody and control of drugs – Whether conduct signified knowledge of drugs – Whether car*
D *belonged to accused persons – Whether conviction and sentence safe – Dangerous Drugs Act 1952, ss. 2, 12(2), 37(da), 39A(2) & 39B(2)*

EVIDENCE: *Conduct – Attempt to flee – Trafficking in dangerous drugs – Accused person attempted to flee upon discovery of drugs in car boot – Whether attempt to flee signified knowledge of drugs – Whether accused person could be said to have*
E *knowledge, custody and control of drugs*

The first appellant was stopped by the police for allegedly driving in a suspicious manner. Together with the first appellant was the second appellant as the passenger. A search in the car boot led to the discovery of 15 packages
F containing substances which were later confirmed by the chemist to be monoacetylmorphines, methamphetamine and nimetazepam. According to the police, the appellants looked restless. The first appellant said 'minta tolong' and 'minta settle' while the second appellant attempted to flee but was successfully arrested. The appellants were charged at the High Court for trafficking dangerous drugs, an offence under s. 39B(2) of the Dangerous
G Drugs Act 1952 ('the DDA'). From their conduct, the trial judge found that they were in possession of the drugs and the element of trafficking had been proved under ss. 2 and 37(da) of the DDA. Satisfied that the prosecution had established a *prima facie* case, the appellants were called to enter their defence. The appellants denied knowledge of the drugs and testified that the
H car was borrowed from the first appellant's boyfriend ('Michael'). The second appellant explained that he fled after the police had discovered the drugs as he was afraid. The trial judge found that (i) the appellants' defence was a mere denial; (ii) the identity of Michael was only raised at the defence case and was therefore a recent invention and an afterthought; and (iii) the
I defence of both the appellants failed to raise a reasonable doubt on the prosecution's case and failed to rebut the presumption on a balance of probabilities. The appellants were convicted for the offence and sentenced to death. Hence, the present appeals. The appellants submitted that (i) the trial

judge erred in His Lordship's findings on the element of trafficking by invoking both ss. 2 and 37(da) of the DDA; (ii) the second appellant could not be said to have custody and control of drugs because he had no custody and control of the car as he was not the owner of the car; and (iii) the defence of the second appellant as to why he fled was not given any consideration by the trial judge.

Held (allowing appeals)
Per Tengku Maimun Tuan Mat JCA delivering the judgment of the court:

(1) At the end of the prosecution's case, the trial judge found that the element of trafficking had been proved under s. 37(da)(iiia) of the DDA and at the end of the defence case, His Lordship had addressed his mind correctly on the burden of the appellants to rebut the presumption on a balance of probabilities. (para 32)

(2) The trial judge failed to adequately consider the defence of the appellants. Although the identity of Michael was only raised at the defence case and was correctly labelled by the trial judge as an afterthought and a recent invention, the trial judge failed to consider that based on evidence, it was clear that neither the first nor the second appellant was the owner of the car. As for their conduct, there was no evidence to established that the words 'minta tolong' and 'minta settle' uttered were in specific reference to the drugs found in the car boot. An inference favourable to the first appellant may be drawn that the words uttered were in relation to the manner she was driving the car. (paras 37-38)

(3) Upon noticing the police patrol car at the highway, the appellants could have accelerated without stopping if they had knowledge of the drugs in the car boot. However, they cooperated with the police and the second appellant had given his explanation that he only fled upon hearing about the drugs from the police. Therefore, the second appellant had discharged the onus of explaining his conduct under s. 9 of the Evidence Act 1950. (para 39)

(4) The conviction and sentence of the High Court on the charge of trafficking was set aside and substituted with one of possession under s. 12(2) of the DDA and punishable under s. 39A(2) of the DDA read with s. 34 of the Penal Code. The appellants were sentenced to 18 years imprisonment. (para 40)

Bahasa Malaysia *Headnotes*

Perayu pertama ditahan oleh pihak polis kerana dikatakan memandu dalam keadaan yang mencurigakan. Bersama-sama dengan perayu pertama ialah perayu kedua iaitu penumpangnya. Carian pada but kereta menjumpai 15 bungkusan berisi bahan yang kemudian disahkan oleh ahli kimia sebagai monoacetylmorphines, methamphetamine dan nimetazepam. Menurut pihak polis, perayu-perayu kelihatan gelisah. Perayu pertama mengatakan 'minta

A tolong' dan 'minta settle' manakala perayu kedua cuba melarikan diri tetapi berjaya diberkas. Perayu-perayu dituduh di Mahkamah Tinggi kerana mengedar dadah, satu kesalahan bawah s. 39B(2) Akta Dadah Berbahaya 1952 ('ADB'). Berdasarkan perilaku mereka, hakim bicara memutuskan mereka mempunyai milikan dadah dan elemen pengedaran bawah ss. 2 dan
B 37(da) ADB berjaya dibuktikan. Berpuas hati pihak pendakwaan telah membuktikan satu kes *prima facie*, perayu-perayu dipanggil membela diri. Perayu-perayu menafikan pengetahuan tentang dadah dan mengemukakan keterangan bahawa kereta tersebut dipinjam daripada teman lelaki perayu pertama ('Michael'). Perayu kedua menjelaskan dia melarikan diri selepas
C pihak polis menemui dadah kerana dia takut. Hakim bicara memutuskan (i) pembelaan perayu adalah penafian semata-mata; (ii) identiti Michael hanya dibangkitkan semasa kes pembelaan dan dengan itu, adalah satu rekaan baharu dan fikiran semula; dan (iii) pembelaan kedua-dua perayu gagal membangkitkan keraguan munasabah terhadap kes pendakwaan dan gagal menyangkal anggapan atas imbangan kebarangkalian. Perayu-perayu
D disabitkan atas kesalahan dan dijatuhkan hukuman mati. Maka timbul rayuan-rayuan ini. Perayu-perayu menghujahkan (i) hakim bicara terkhilaf dalam dapatan beliau tentang elemen pengedaran dengan mengguna pakai ss. 2 dan 37(da) ADB; (ii) perayu kedua tidak boleh dikatakan mempunyai milikan dan jagaan dadah kerana dia tiada milikan dan jagaan kereta kerana
E dia bukan pemilik kereta tersebut; dan (iii) pembelaan perayu kedua tentang percubaannya melarikan diri tidak dipertimbangkan langsung oleh hakim bicara.

Diputuskan (membenarkan rayuan-rayuan)

Oleh Tengku Maimun Tuan Mat HMR menyampaikan penghakiman
F **mahkamah:**

(1) Pada penutup kes pendakwaan, hakim bicara memutuskan elemen pengedaran berjaya dibuktikan bawah s. 37(da)(iiia) ADB dan pada hujung kes pembelaan, beliau dengan betul mengarahkan minda beliau
G pada beban yang dipikul oleh perayu-perayu untuk menyangkal anggapan imbangan kebarangkalian.

(2) Hakim bicara gagal mempertimbangkan pembelaan perayu-perayu dengan secukupnya. Walaupun identiti Michael hanya dibangkitkan semasa kes pembelaan dan dengan betul dilabel oleh hakim bicara
H sebagai satu fikiran semula dan rekaan baharu, hakim bicara gagal mempertimbangkan bahawa, berdasarkan keterangan, perayu pertama dan kedua ternyata bukan pemilik kereta tersebut. Tentang perilaku mereka, tiada keterangan yang membuktikan yang ungkapan 'minta tolong' dan 'minta settle' diungkapkan dengan khususnya merujuk pada
I dadah yang dijumpai dalam but kereta. Satu kesimpulan berpihak pada perayu pertama boleh dibuat iaitu dia mengeluarkan kata-kata tersebut merujuk pada kereta yang dipandunya.

(3) Menyedari kereta ronda polis berada di lebuh raya, perayu-perayu boleh memecut tanpa berhenti jika mereka mempunyai pengetahuan terdapat dadah dalam but kereta. Walau bagaimanapun, mereka memberi kerjasama dan perayu kedua memberi penjelasan yang dia hanya melarikan diri apabila mendengar tentang dadah daripada pihak polis. Oleh itu, perayu kedua telah melepaskan beban menjelaskan perilakunya bawah s. 9 Akta Keterangan 1950.

(4) Sabitan dan hukuman oleh Mahkamah Tinggi bagi pertuduhan pengedaran diketepikan dan diganti dengan milikan bawah s. 12(2) ADB dan boleh dihukum bawah s. 39A(2) ADB dibaca bersama-sama dengan s. 34 Kanun Keseksaan. Perayu-perayu dijatuhkan hukuman 18 tahun penjara.

Case(s) referred to:
Abdul Aziz Jamal v. PP [2016] 6 CLJ 485 CA ***(refd)***
Ibrahim Mohamad & Anor v. PP [2011] 4 CLJ 113 FC ***(refd)***
Lany Masangkay Magnaye lwn. PP & Satu Lagi Rayuan [2016] 4 CLJ 64 CA ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 289
Dangerous Drugs Act 1952, ss. 2, 6, 12(2), 37(da)(iiia), 39A(2), 39B(1)(a), (2), First Schedule
Evidence Act 1950, ss. 8, 9
Penal Code, s. 34

For the 1st appellant - Hisyam Teh Poh Teik; M/s Teh Poh Teik & Co
For the 2nd appellant - Fadhli Sutris; M/s Lim Gary & Fadhli Sutris
For the respondent - Nadia Hanim Mohd Tajuddin; DPP

[Editor's note: Appeal from High Court, Muar; Criminal Trial No: 45A-09-03-2012 (overruled).]

Reported by Najib Tamby

JUDGMENT

Tengku Maimun Tuan Mat JCA:

[1] Lau Fong Yee (the first appellant) and Ng Peng Seng ('the second appellant') were the first accused and the second accused respectively in the High Court. They were convicted and sentenced to death by the High Court at Muar for trafficking in 283.92g of heroin and 97.10g of monoacetylmorphines, an offence punishable under s. 39B(2) of the Dangerous Drugs Act 1952 ('the Act') read with s. 34 of the Penal Code (the trafficking charge). The offence was said to be committed on 29 November 2011 at about 3.45pm at KM 160, Arah Selatan, Lebuhraya Utara Selatan, Ledang, Johor.

[2] The first appellant was also convicted and sentenced to three years and two years imprisonment for being in possession of 5.88g methamphetamine and 0.04g nimetazepam respectively, an offence under s. 12(2) punishable under s. 39A(2) of the Act (the possession charges).

[3] Aggrieved by the decision of the High Court, the appellants appealed to this court. We had unanimously allowed the appeal, set aside the order of the High Court on the trafficking charge and substituted with an order of possession under s. 12(2) punishable under s. 39A(2) of the Act against both the appellants.

[4] Having heard the submissions of learned counsel and learned DPP, we sentenced both the appellants to 18 years imprisonment from the date of arrest. No whipping was imposed on both the appellants as s. 289 of the Criminal Procedure Code forbids whipping by virtue of the first appellant being a female and the second appellant being more than 50 years of age. We affirmed the convictions and sentences of the High Court against the first appellant on the possession charges.

[5] We now provide our reasons.

The Prosecution's Case

[6] Briefly, Sarjan Samsaimee bin Yusof (SP6) and Kpl Rahimi Mohd Nor (SP7) were on duty at KM 160, Lebuhraya Utara Selatan when SP6 noticed a Nissan Central JLD 4060 driven in a suspicious manner. The car was stopped. It was driven by the first appellant. The second appellant was the front passenger.

[7] SP6 searched the boot of the car. He found a greenish blue bag (exh. P5A). Inside P5A, SP6 found 15 packages wrapped in Chinese newspaper containing substance suspected to be dangerous drugs (exhs. P10-P24B). Both the appellants were said to be 'gelisah'. The first appellant was said to 'minta tolong' and 'minta settle'. Both the appellants attempted to flee. The first appellant was immediately arrested. The second appellant fled with the car and crashed into a lorry. He then fled on foot but was subsequently arrested.

[8] The appellants and the exhibits were brought to the police station at Yong Peng. At the police station, the first appellant was physically searched where the drugs which formed the subject matter of the possession charges were recovered from an LV purse. The purse was found in the jeans that the first appellant wore.

[9] The appellants and the exhibits were handed over to Insp. Rosilawati binti Jusoh, the investigating officer (SP9). SP9 later sent the 15 packages recovered from the car and the drugs recovered from the first appellant's person to the Chemistry Department for analysis.

[10] Azmira binti Abd Rahman, the chemist (SP2) testified that she received the drug exhibits from SP9. Upon analysis of the exhibits, SP2 confirmed the type and quantity of the drugs which formed the subject matter of the trafficking and the possession charges. Heroin, monoacetylmorphines, methamphetamine and nimetazepam are listed in the First Schedule to the Act.

Findings At The End Of The Prosecution's Case

[11] From the conduct of the appellants, the learned trial judge found that they were in possession of the drugs in the boot of the car and that the element of trafficking had been proved under s. 2 and s. 37(da) of the Act.

[12] As for the element of common intention, the following was the finding of the learned trial judge (appeal record vol. 1: p. 20):

> 35. Daripada keterangan saksi-saksi Pendakwaan jelas bahawa kedua-dua OKT telah ditahan semasa berada di dalam kereta yang menuju ke suatu destinasi dan dengan membawa dadah-dadah yang telah dibungkus dengan sempurna sebagaimana yang dijumpai oleh SP6. Maka dengan itu adalah jelas bahawa kedua-dua Tertuduh memang mempunyai niat bersama bagi mengedar dadah tersebut. Dengan itu seksyen 34 Kanun Keseksaan telah dipenuhi oleh pihak Pendakwaan.

[13] Having found that the prosecution had made out a *prima facie* case against the appellants, the appellants were called upon to enter their defence.

The Defence

[14] Both the appellants gave evidence under oath. Their defence essentially was that they had no knowledge of the drugs found in the boot of the car.

[15] The first appellant testified that the car did not belong to her. On 28 November 2011 at about 11.00pm, she and the second appellant went to Holiday Plaza, Johor Bahru to borrow the car from her boyfriend, Michael. The first appellant wanted to go to Genting Highlands to gamble. They reached Genting Highlands at about 4-5am on 29 November 2011 and were there until 10am.

[16] The first appellant stated that at about 9am on 29 November 2011, she received a call from Michael, informing her that he needed the car urgently. She and the second appellant were on their way back to Johor Bahru when they were arrested. The bag exh. P5A did not belong to her.

[17] The second appellant gave similar evidence as regards borrowing the car from Michael and the purpose of borrowing the car. The testimony of the second appellant was also consistent with the first appellant in respect of the call from Michael on the urgent need for the car to be sent back.

[18] The second appellant testified that when he borrowed the car from Michael, he did not check the boot of the car. He only checked the meter box and oil filter. The second appellant explained that he fled after the police had discovered the drugs in the boot as he was afraid. He said he knew the sentence for drugs was death.

Findings At The Conclusion Of The Case

[19] The learned trial judge found that the defence of both the appellants was a mere denial and that the identity of Michael was only raised at the defence case. Michael was thus a recent invention and an afterthought.

[20] Adverting to the conduct of both the appellants, the learned trial judge found that the defence of both the appellants had failed to raise a reasonable doubt on the prosecution's case and had failed to rebut the presumption on a balance of probabilities. The appellants were thus convicted and sentenced as aforesaid, hence the appeals.

The Appeals

[21] For the first appellant, learned counsel submitted that the learned trial judge erred in the following aspects of his finding at the *prima facie* case:

(i) On the element of trafficking by invoking both s. 2 and s. 37(da) of the Act; and

(ii) On the element of common intention.

[22] On trafficking, learned counsel highlighted the following finding of the learned trial judge (appeal record vol. 1, p. 19):

> 33. ... adalah jelas bahawa berat dadah adalah melebihi 15 gram dan dengan itu anggapan di bawah seksyen 37(da)(iiia) Akta Dadah Berbahaya mahu pun tafsiran di bawah seksyen 2 Akta Dadah Berbahaya boleh diterima pakai bagi menunjukkan kedua-dua OKT telah mengedar dadah seperti mana tafsiran di bawah seksyen 2 Akta Dadah Berbahaya. Dengan itu Pendakwaan telah berjaya mengasaskan satu kes *prima facie* terhadap kedua-dua OKT bagi pengedaran dadah merbahaya tersebut.

[23] Citing the decision of this court in the case of *Abdul Aziz Jamal v. PP* [2016] 6 CLJ 485, learned counsel submitted that the learned trial judge erred in failing to make a specific finding of whether trafficking was proved by way of direct evidence or presumption. Learned counsel submitted that on this ground alone, the appeal ought to be allowed.

[24] In respect of common intention, learned counsel submitted that there was no pre-arranged plan or meeting of mind to conclude that there was common intention between the first and the second appellants to traffic in dangerous drugs. Paragraph 35 of the grounds of judgment quoted above, submitted learned counsel, was not sufficient to prove the element of common intention. *Lany Masangkay Magnaye lwn. PP & Satu Lagi Rayuan* [2016] 4 CLJ 64 was cited in support of the submission.

[25] As for the defence, learned counsel contended that the learned trial judge had failed to sufficiently evaluate the defence of the first appellant, in particular, that the first appellant had no knowledge of the drugs. The learned trial judge failed to consider that the evidence of the prosecution witnesses on the conduct of the first appellant was challenged and that there was no evidence as to how long the car was used by the first appellant prior to her arrest. Learned counsel urged the court to follow the decision of the Federal Court in the case of *Ibrahim Mohamad & Anor v. PP* [2011] 4 CLJ 113 where the facts are similar to the present appeals.

[26] For the second appellant, learned counsel adopted the submissions of counsel for the first appellant. Additionally, it was submitted that the conviction of the second appellant was certainly not safe for the following reasons.

[27] The second appellant was only the passenger and not the owner of the car. The second appellant therefore had no custody and control of the car and cannot be said to have custody and control of the drugs in the car.

[28] As for the second appellant's conduct in fleeing, whilst conceding that the learned trial judge was correct to rely on the conduct under s. 8 of the Evidence Act 1950, learned counsel submitted that at the highest there was knowledge but not custody and control of the drugs. Learned counsel also submitted that there was a gap in the prosecution's case as the owner of the car was not called to testify.

[29] On common intention, learned counsel submitted that there must be a finding by the learned trial judge of a pre-arranged plan which preceded the act constituting the offence, which in this case, there was none. Learned counsel further submitted that there was an error in the finding of the learned trial judge that both the appellants were carrying the dangerous drugs in the car. The second appellant did not carry the dangerous drugs because he was not the driver of the car.

[30] The final issue canvassed by learned counsel for the second appellant was that the defence of the second appellant was not considered at all by the learned trial judge. The second appellant had given his explanation as to why he fled. The learned trial judge was duty bound to consider the explanation given by the second appellant under s. 9 of the Evidence Act 1950 but His Lordship failed to do so and this failure, submitted learned counsel, amounted to a serious misdirection.

Our Findings

[31] Learned counsel for the first appellant relied on the case of *Abdul Aziz Jamal (supra)* to contend that the misdirection of the learned trial judge in applying both ss. 2 and 37(da) warranted the appeals to be allowed. In *Abdul Aziz Jamal (supra)*, this court found that the learned trial judge had seriously misdirected himself on several aspects. The first aspect was when His

Lordship stated on one hand that his finding was made independent of the statutory presumptions, yet on the other hand he invoked the statutory presumption. The second aspect was when the learned trial judge invoked not the presumption of either possession or trafficking but both presumptions of possession and trafficking and the third aspect of the misdirection was when the learned trial judge failed to rule at the end of the defence case whether the appellant had rebutted the presumptions.

[32] We were not persuaded that these appeals ought to be allowed on this ground alone. Suffice to state that we did not find the infirmities as in *Abdul Aziz Jamal (supra)*, in the instant appeals. The learned trial judge in these appeals found at the end of prosecution's case that the element of trafficking had been proved under s. 37(da)(iiia) and at the end of the defence case, His Lordship had addressed his mind correctly on the burden of the appellants to rebut the presumption on a balance of probabilities.

[33] Nevertheless, we found merits in the complaint that the learned trial judge had failed to adequately consider the defence of the appellants and we further found that the facts and circumstances of the present appeals fit into the judgment of the Federal Court in the case of *Ibrahim Mohamad (supra)*.

[34] In *Ibrahim Mohamad*, the accused persons were apprehended at a roadblock during the inspection of a vehicle driven by the first accused. Neither the first nor the second accused was the owner of the vehicle. At the back seat of the vehicle, police discovered 40 transparent plastic packages of cannabis. Both the accused were convicted and sentenced to death under s. 39B(1)(a) of the Act for trafficking in 38,499g of cannabis. Their conviction and sentence was affirmed by this court but was set aside by the Federal Court. The Federal Court found that the conviction of both the accused on the charge of trafficking was not safe. The conviction and sentence of the court below were thus set aside and substituted with one of possession under s. 6 of the Act punishable under s. 39A(2) of the Act read with s. 34 of the Penal Code. For ease of reference, we reproduce below the relevant passages of the judgment of the Federal Court:

> [7] In the present case the only evidence which the learned trial judge had relied upon in order to conclude that both the accused were in custody or control of the drugs are as follows:
>
> (i) that the first accused was the driver of the vehicle and the second accused was the passenger on the date of his arrest;
>
> (ii) that the second accused was previously summoned for driving the vehicle without licence in Kulim, Kedah on 14 May 1999, about six months prior to the date of his arrest in the present case.
>
> [8] We are of the view notwithstanding the fact that the first accused and the second accused were in the vehicle when it was stopped at the roadblock for inspection, neither the first accused nor the second accused was the registered owner of the vehicle. ...

...

...

[14] The mere fact that the second accused was found in the vehicle and that he was previously summoned for driving the vehicle somewhat approximately six months prior to the date of arrest are insufficient for the court to make an inference that he had exclusive custody or control over the vehicle. Even if the learned trial judge was correct in deciding that both the accused were in custody or control of the vehicle when they were stopped by the police party, this could not be translated into having custody or control over the said drugs in the absence of other incriminating evidence against them. It could not have given rise to the inference that the said drugs belonged to them. (See the case of *PP v. Lin Lian Chen* [1992] 4 CLJ 2086; [1992] 1 CLJ (Rep) 285).

[15] The law is well settled that having only custody or control over the said drugs is insufficient to establish "possession". The physical act of custody and control must be accompanied with evidence that the accused had knowledge of the said drugs. In the absence of any statutory presumption, knowledge has to be proved either by direct evidence or circumstantial evidence. Mere knowledge alone without exclusivity of either physical custody or control or both is insufficient in law to constitute possession, let alone trafficking. (See the case of *Chan Pean Leon v. PP* [1956] 1 LNS 17).

[16] In the present case, the learned trial judge made the inference that both the accused had knowledge of the said drugs by relying on their conduct after they were arrested in particular their act of fleeing from the scene. This was affirmed by the Court of Appeal. On this point we are of the view that the trial judge had clearly overlooked the other inferences that could have been made from the act of fleeing or absconding. Where there are two or more inferences that could be made the inference most favourable to the accused must be drawn. (See the case of *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457).

[17] Whilst the conduct of the accused fleeing the scene may be a relevant factor to be considered, such a conduct however must be weighed against the circumstances of the case. ... As regards the present case it is noted that the road leading to the "road block" is a straight road and therefore the first accused being the driver of the vehicle could have clearly seen the "road block" miles away. The fact that the first accused did not make a u-turn or attempt to run away before approaching the "road block" can give rise to an inference that both the first and the second accused had no knowledge of the drugs in the vehicle.

[35] The Federal Court found that both the accused had given sufficient explanation as to their conduct of running away from the scene of the crime, namely that they heard the prosecution witnesses saying "ada ganja" during the inspection of the vehicle and it was only at that moment that both of them ran away. The Federal Court ruled that both the accused had discharged the onus of explaining their conduct as provided for under s. 9 of the Evidence Act.

[36] Likewise in the present appeals. We found that it was not safe to sustain the conviction on the charge of trafficking against both the appellants on similar grounds as stated in the case of *Ibrahim Mohamad (supra)*.

[37] Although we agreed with the learned trial judge that the identity of Michael was only raised at the defence case and was thus correctly labelled by the learned trial judge as an afterthought and a recent invention, we found quite apart from the issue of Michael, the learned trial judge had failed to consider that from the evidence before the court, it was clear that neither the first nor the second appellant was the owner of the car.

[38] As for conduct, the first appellant had challenged the prosecution's version and even if the court were to accept the prosecution's evidence that the first appellant 'minta tolong' and 'minta settle', there was no evidence to establish that the words uttered was in specific reference to the drugs found in the boot of the car. An inference favourable to the first appellant may be drawn that the words uttered were in relation to the manner she was driving the car.

[39] Further, similar to the facts in *Ibrahim Mohamad (supra)*, the appellants, upon noticing the police patrol car at the Highway, could have accelerated without stopping if they had knowledge of the drugs in the boot of the car. But they co-operated with the police and the second appellant had given his explanation that he only fled upon hearing about the drugs from the police, which explanation was not considered by the learned trial judge. As in Ibrahim Mohamad, we similarly found that the second appellant had discharged the onus of explaining his conduct under s. 9 of the Evidence Act.

[40] We therefore unanimously allowed the appeals. The conviction and sentence of the High Court on the charge of trafficking was set aside and substituted with one of possession under s. 12(2) of the Act and punishable with s. 39A(2) read with s. 34 of the Penal Code. We sentenced the appellants to 18 years imprisonment from the date of their arrests. In the circumstances we do not see the need for us to discuss the issue of common intention raised by the appellants.